

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEALS NO. 92 AND 294 OF 2004.

FIRST APPEAL NO. 92 OF 2004.

1. Shri Carlos Tavora,
son of Shri Augusto Tavora,
major, married.
2. Mrs. Tithi Tavora,
(expired), wife of Carlos Tavora,
Medical Practitioner,
Both residents of Trionora
Apartments, Panaji, Goa.
- 2a). Miss Danika Tavora,
aged 9 yrs. Student,
r/o Trionora Apartments,
Panaji, Goa.
- 2.b) Mast. Aditya Tavora,
aged 5 yrs.,
r/o Trionora Apartments,
Panaji, Goa.
3. Miss Martha Braganza,
daughter of Caetano Braganza,
spinster, housemaid,
residing at House No.5/158,
Umta-vaddo, Calangute,
Bardez, Goa. ... Appellants.

Versus

1. Smt. Maria Felicidade
Fernandes e Lobo,
widow of Savio Lobo,
housewife.
2. Joanita Lobo,
daughter of Savio Lobo, student.
3. Savio Lobo,
son of Savio Lobo, student.
All residents of House No.133,
Umtavaddo, Calangute, Goa. Respondents.

Shri Sudin M.S. Usgaonkar, Advocate for the Appellants.

Shri N.N. Sardessai, Advocate for the Respondents.

FIRST APPEAL NO. 294 OF 2004.

1. Smt. Maria Felicidade Fernandes
e Lobo, widow of Savio Lobo,
housewife.
2. Joanita Lobo,
daughter of Savio Lobo, Student.
3. 3. Savio Lobo,
son of Savio Lobo, Student.
All r/o House No. 133,
Umtavaddo, Calangute,
Bardez, Goa. Appellants.

Versus

1. Shri Carlos Tavora,
son of Shri Augusto Tavora, major,
married.
2. Mrs. Tithi Tavora
(expired), wife of
Carlos Tavora, Medical Practitioner,
both residents of Trionora
Apartments, Panaji, Goa.
- 2a. Miss Danika Tavora,
aged 8 years, student,
r/o Trionora Apartmnts,
Panaji, Goa.
- 2b. Mast. Aditya Tavora,
aged 5 years,
r/o Trionora Apartments, Panaji, Goa.
3. Miss Martha Braganza,
d/o Caetano Braganza,
spinster, housemaid,
residing at H. No. 5/158,
Umta-vaddo, Calangute, Goa. Respondents.

Shri Nitin Sardessai, Advocate for the Appellants.

Shri Sudin M.S. Usgaonkar, Advocates for the Respondents No.1, 2a, 2b and 3.

**CORAM: A. P. LAVANDE &
N. A. BRITTO, JJ.**

DATE: 19/24th JANUARY, 2005.

ORAL JUDGMENT: (PER BRITTO, J.)

These appeals are filed by both the parties in Special Civil Suit No. 190/1998/B against the Judgment/Decree dated 31.12.2003.

2. The parties hereto shall be referred to in the names as they appear in the cause title of the said Civil Suit.
3. The dispute between both the parties is regarding the property situated at Calangute known as ' Sullachi Nhat' surveyed under No. 176/3 of village Calangute with a house in it bearing Village Panchayat No. 5/158.
4. There is no dispute that the suit property belonged to Joao Francisco Lobo and his wife Maria Joaninha Milagres de Sao Francisco do Rosario Pereira e Lobo alias Joanita Lobo. The said Joao Francisco Lobo died on or about 1.2.1998 and prior to that the said Joanita Lobo died on or about 30.3.1979.
5. The defendants are the widow and children of Joao Domingos Savio do Rosario Lobo (Savio, for short) who died on or about 17.10.1984.

Prior to his death on 1.2.1998, the said Joao Francisco Lobo executed a Will on 7.1.97 in favour of the plaintiff No.1. The plaintiffs claim the suit property based on the said Will. According to the plaintiffs the said Savio was an orphan brought from Belgaum by the said Joao F. Lobo who subsequently turned out to be a wayward youth and became a liability to Joao F. Lobo and who used to harass the said Joao F. Lobo and his wife Joanita Lobo. It was the case of the plaintiffs that the said Savio married defendant no.1 against the wishes of the said Joao F. Lobo and who lived in the suit house for some time and after the death of the said Savio, the defendants started living with the mother of the defendant No.1 in House No.133 in the same village. The case of the plaintiffs was that upon the death of the said Joao Lobo on or about 1.2.1998 the plaintiff No.1 became the absolute owner in lawful possession of the entire estate of the said Joao F. Lobo including the suit property and the suit house and plaintiff No.1 took control and possession of the same and used to visit the same twice a week. Further the case of the plaintiffs was that the plaintiff No.3 who was permitted by the said Joao Lobo to occupy the suit house during her lifetime was in actual, physical and exclusive possession of the suit house and was occupying one room of the suit house to the south, but on or about 4.12.98 the plaintiff No.1 found that the defendants were seen in the suit house who were informed that by virtue of Will dated 7.1.1997 the plaintiff No.1 had become the absolute and exclusive owner of the entire estate of Joao F. Lobo, whereupon the defendants are alleged to have gone out of the house, but on 10.2.1998 the defendants again occupied the suit house and on being questioned, told the plaintiff No.1 that they would not vacate the suit house. Thereupon on or about 14.2.98 the plaintiff No.1 filed a

complaint of house trespass against the defendants and then the suit, praying, inter alia, for eviction of the defendants, permanent injunction and mesne profits.

6. The defendants contested the suit, inter alia, stating that the defendants were residing in the suit house from the time of marriage of defendant No.1 to the said Savio. The defendant No.1 claims that the said Savio was the legitimate son of her father-in-law, Joao Francisco Lobo. The defendant No.1 further stated that the marriage of defendant No.1 was celebrated in the suit house and the defendants also possessed ration card and drew ration from the suit house and the plaintiff No.1 on the strength of a bogus Will was attempting to lay a false claim over the suit property which Will, the defendants with usual refrain, pleaded was fraudulent, sham and bogus. The defendants stated that the plaintiff No.3 was permitted to occupy one room of the suit house on humanitarian grounds as plaintiff No.3 pleaded with defendant No.1 that she had nowhere to go. Further, the defendants stated that the plaintiff No.1 forcibly trespassed in the suit house on 4.2.98 along with police personnel and some anti-social elements and took away, inter alia, cash of Rs.82,500/- and fixed deposits in the sum of Rs.3,97,000/-. The defendants filed a counter claim to recover the said amounts.

7. The learned Civil Judge came to the conclusion that the Will was valid. First Appeal No.294/04 has been filed by the defendants against the said finding of the learned Civil Judge, Senior Division. The learned Civil Judge also came to the conclusion that the plaintiffs had failed to prove that Savio was not the

child of the late Joao Francisco Lobo. The learned Civil Judge also came to the conclusion that the defendants were the co-owners of the suit property and the suit house and that the Will could be reduced in Inventory proceedings, and, therefore, proceeded to dismiss the suit. First Appeal No.92/04 is filed by the plaintiffs against the said findings.

8. Although the dispute between both the parties was regarding the suit property/suit house including movables allegedly taken by plaintiff No.1, the essence of controversy between them was regarding the validity of the Will dated 7.1.1997 executed by the said Joao Francisco Lobo and the paternity or legitimacy of the said Savio.

9. As far as F.A. No.294/04 is concerned, the said Will dated 7.1.1997 was challenged by the defendants with the said usual refrain as being not valid, the same having been executed by fraud, misrepresentation and undue influence. The learned Civil Judge noted, and in our view rightly, that the defendants had not even given particulars of the said fraud, misrepresentation, etc. Not only that, the defendants had not even led any iota of evidence to prove the said plea taken by them. In our view, therefore, the learned Civil Judge was right in concluding that the said Will was valid. F.A. No.294/04 therefore, deserves to be dismissed.

10. Shri Sardessai, the learned counsel of the defendants having realised the situation submits that the contents of the said Will have not been proved by the plaintiffs by examining any of the parties to the said Will, assuming the testator

was dead. Shri Sardesai next submits that the defendants have been able to show that some of recitals in the said Will were false and therefore there is no reason to believe that the other recitals made in the said Will, namely, to the effect that the testator - the said Joao Francisco Lobo had no ascendants were correct. In support of the said submission Shri Sardesai has placed reliance on the case of **Cement Corpn. Of India Ltd. v. Purya and others [(2004) 8 S.C.C. 270]** .

11. In the case of Cement Corpn. Of India Ltd. (supra) The Hon'ble Supreme Court was dealing with S.51-A of the Land Acquisition Act, 1894 and with reference to it, the Hon'ble Supreme Court observed that :-

“ In the ordinary course a deed of sale is the evidence of a transaction by reason whereof for a consideration mentioned therein the title and interest in an immovable property specified therein is transferred by the vendor to the vendee. Genuineness of such transaction may be in question. In a given situation the quantum of consideration or the adequacy thereof may also fall for adjudication. The courts, more often than not, are called upon to consider the nature of the transaction. Whenever a transaction evidenced by a sale deed is required to be brought on record, the execution thereof has to be proved in accordance with law. For proving such transaction, the original sale deed is required to be brought on record by way of primary

evidence. Only when primary evidence is not available, a certified copy of the sale deed can be taken on record. Such certified copies evidencing any transaction are admissible in evidence, if the conditions precedent therefor in terms of Section 75 of the Indian Evidence Act are fulfilled. The transaction evidenced by the sale deed must be proved in accordance with law. “

“ Evidences are of different types. They may be direct, indirect or real evidence. The existence of a given thing or fact is proved either by its actual production or by the testimony or admissible declaration of someone who has himself perceived it. Such evidence would be direct evidence. Presumptive evidence which is an indirect evidence would mean that when other facts are, thus, ; proved, the existence of the given fact may be logically inferred. Although the *factum probandum* and the *factum probantia* connote direct evidence, the former is superior in nature. “

“ Although by reason of the aforementioned provision the parties are free to produce original documents and prove the same in accordance with the terms of the rules of evidence as envisaged under the Indian Evidence Act, the L.A. Act provides for an alternative thereto by inserting the said provision in terms whereof the certified copies which are otherwise secondary evidence may be brought on

record evidencing a transaction. Such transactions in terms of the aforementioned provision may be accepted in evidence. Acceptance of an evidence is not a term of art. It has an etymological meaning. It envisages exercise of judicial mind to the materials on record. Acceptance of evidence by a court would be dependent upon the facts of the case and other relevant factors. A piece of evidence in a given situation may be accepted by a court of law but in another it may not be. “

“ 'Acceptance of evidence' relating to transaction evidenced by a sale deed, its admissibility in evidence would be beyond any question. We are not oblivious of the fact that only by bringing a documentary evidence in the record it is not automatically brought on the record. For bringing a documentary evidence on the record, the same must not only be admissible but the contents thereof must be proved in accordance with law. But when the statute enables a court to accept a sale deed on the records evidencing a transaction, nothing further is required to be done. The admissibility of a certified copy of sale deed by itself could not be held to be inadmissible as thereby a secondary evidence has been brought on record without proving the absence of primary evidence. Even the vendor or vendee thereof is not required to examine themselves for proving the contents thereof. This, however, would not mean that the contents of the transaction as

evidenced by the registered sale deed would automatically be accepted. The legislature advisedly has used the word 'may'. A discretion, therefore, has been conferred upon a court to be exercised judicially i.e. upon taking into consideration the relevant factors.. “

12. In our view the said observations of the Supreme Court are inapplicable to the case at hand. The said observations were made in relation to sale deeds which are essentially private documents and with reference to Section 51-A of the said Act and which documents are otherwise executed before a public officer and a public record is kept of the same. In the case at hand the plaintiffs have produced a certified copy of the said Will. In this State and in this case the Will was executed with the intervention of a Notary Public, who is a public functionary under the law in force, namely Decree no.8373 dated 18.9.1922 and in accordance with Articles 1911 onwards of the Civil Code, 1867, and therefore is a public document which can be proved by production of a certified copy as provided by S.77 of the Indian Evidence Act, 1872. Such a Will carries with it a ring or a halo of its authenticity and reliability and it is presumed to be true until disproved.

13. It is to be noted that a Notary as envisaged under the Notarial Law of Decree No.8373 dated 18.9.22 is a public servant whose functions, under the said law, in general are to intervene in all extra judicial acts which are in need of certainty and authenticity, and in particular to record, inter alia, public wills and all other authentic extra judicial official documents or to intervene in their

making. Therefore, a will made in this State under the said law carries with it a presumption of correctness, authenticity and reliability, a presumption which has got to be accepted until the contrary is proved. In other words, every statement made by the Notary of what was said and done by him in his official capacity is to be presumed to be true until the contrary is proved. A similar system of law relating to notaries public is followed in France. With a view to explain this system to British Jurists to acquire the knowledge of French law. Sir Otto Kahn-Freund, Claudine Levy and Bernard Rudden in their Book “ A Source Book on French Law – System-Methods Outlines of Contract” says :-

“ The legal significance of his (Notary's) office stems partly from the much stronger force which notarial documents (actes authentiques) have compared with private documents (actes sous seing prive).

.... Each statement made by a notaire of what was said or done before him in his official capacity is presumed true until disproved in a formal procedure (inscription de faux) which is hardly ever used. “

14. Regarding the second submission of Shri Sardesai, we are not at all inclined to accept that some of the recitals in the said Will have been shown to be false. Before this submission is dealt with further, the relevant portion of the said Will dated 7.1.97 could be reproduced. It reads as follows :-

“ Whereas, he the testator is now far advanced in age, being a widower of Joanita Rosario Pereira e Lobo having no issues of his marriage, and as such having no ascendants or descendants and being so, the testator is

entitled under the law to bequeath, dispose and give by way of will of his right, share and interest to the properties owned by him both movable and immovable and for benefitting his cousin Mr. Carlos Tavora residing Opposite Panaji Municipal Market, Panaji, Goa who has been looking after him and helping him financially and in all his needs, bequeaths unto the said Carlos Tavora by way of Will all his properties, assets, including Bank deposits and all other movable and immovable properties (emphasis supplied).

15. In our view only because the testator at the time of his death was found with cash of Rs.82,500/- or for that matter fixed deposits in the tune of Rs.3,67,000/- is no answer to support the submission of the Defendants that the said Carlos Tavora (plaintiff No.1) had not helped the testator financially. In fact, there has been no sufficient cross-examination on this aspect and we are therefore not inclined to accept the submission of the learned counsel Shri Sardesai that part of the recitals of the said Will have been demonstrated to be false. Even otherwise in our view, assuming the said recital was found to be false, Article 1745 of the Civil Code, 1867 will come to the rescue of the testator or for that matter now of the plaintiffs. When translated it reads as follows :-

“ The mention of a false cause shall be deemed as not written, except when it can be gathered from the same Will, that the testator would not have made such disposition, if he had known the falsity of the cause. “

Law does not require reason or motive to be mentioned in the Will. In our view, when a testator declares in a will what is the reason or motive for making his will and the reason or motive is erroneous or fictitious

such a declaration is deemed inexistent, unless it can be inferred that the testator would not have made the disposition had he known that the reason was erroneous or fictitious. In other words, the fact that the testator has given a wrong reason for making the will does not affect the appointment of the heir or legatee, unless the appointment was made only because of that reason. For example, a father whose son has not been heard of for many years may conclude that his son is dead and make a Will stating that he has no living descendants and institute a third person as his sole heir. In point of fact, the son may still be living. The learned Trial Court has rightly concluded that Carlos Tavora was the cousin of the testator. As already stated even in case the said Carlos Tavora had not helped the testator financially, that would not make the will invalid.

16. The validity of the will, as rightly upheld by the learned Civil Judge, can also be looked at from another angle and that is in the light of Section 32 of the Indian Evidence Act 1872, which reads as follows :-

“ 32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc. is relevant. - Statements, written or verbal of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases :-

(1) when it relates to cause of death. -

(2) or is made in course of business. - ...

- (3) or against interest of maker. -
- (4) or gives opinion as to public right or custom, or matters of general interest. -
- (5) or relates to existence of relationship. - When the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.
- (6) or is made in Will or deed relating to family affairs. - When the statement relates to the existence of any relationship [by blood, marriage or adoption] between persons deceased, and is made in any Will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.
- (7) Or in document relating to transaction mentioned in section 13, clause (a) . -
- (8) or is made by several persons, and expresses feelings relevant to matter in question. - ..

17. In the case at hand the testator has made a categorical statement in the Will that he had no issues or that he had no descendants. In other words, the testator has not accepted that Savio is his legitimate son. Generally, before a

statement made under sub-section (5) of Section 32 is accepted there are several conditions required to be fulfilled namely the statements must be made by a person who is dead or cannot be found, etc. as mentioned in the initial part of the section; secondly the statements must relate to the existence of any relationship by blood, marriage or adoption; thirdly the person making the statements must have special means of knowledge as to the relationship in question and lastly the statements must be ante litem motam i.e. made before the commencement of the controversy actual or legal on the issue involved. If the existence of relationship is evidence under sub-s,(5) of S.32 of the Evidence Act any statement which implies that there is no existence of such relationship between the two persons, also comes under the cover of the sub-section. If a question arises whether a person died issueless or left a son, the statement that he died issueless relates to the existence of relationship by blood. In other words whether a person left a son or not certainly involves a question as to blood relationship between him and the son. In this case the testator has categorically stated that he had no descendants, in other words to say that he had no son. The said statement may not be conclusive as rightly pointed out by Shri Sardesai by relying on the case of **Banwari Lal v. Trilok Chand and others (A.I.R. 1980 S.C. 419)**. However, in our view the said statement of the testator requires to be given great weight. In other words, the said statement is required to be presumed to be true until the contrary is proved. Something to the contrary could have been proved by the Defendants only by leading evidence aliunde.

18. The learned Civil Judge referred to Section 50 of the Indian Evidence Act,

1872. But before referring to the said section, reference is required to be made to the evidence of P.W.4 Dr. Ricardo Mascarenhas. Shri Sardesai has placed reliance in the case of **State of Bihar v. Radha Krishna Singh and Others [(1983) 3 S.C.C. 118]** wherein the Supreme Court has laid down certain tests to be kept in mind while appreciating the evidence of such witnesses, the said principles being that relationship or the connection however close it may be, which the witness bears to the persons whose pedigree is sought to be deposed by him; the nature and character of the special means of knowledge through which the witness has come to know about the pedigree; the interested nature of the witness concerned; the precaution which must be taken to rule out any false statement made by the witness post litem motam or one which is derived not by means of special knowledge about purely from his imagination; and the evidence of the witness must be substantially corroborated as far as time and memory admit.

24th January, 2005.

19. P.W.4 Dr. Ricardo Mascarenhas is a medical practitioner and resident of the same village. He stated that he knew Mr. Joao Francisco Lobo who was married to Maria Joanita Milagres Pereira and that of the said marriage they did not have any children. He further stated that one boy by name Savio was adopted by late Joao Lobo. In cross-examination he stated that when he was studying medicine he was staying with the grandmother of plaintiff No.1 at Panaji for about 3 to 4 years in the years 1959 to 1964 and he used to help the

grandmother of the plaintiff. In our view only because P.W.4 Ricardo Mascarenhas resided with the grandmother of plaintiff No.1 in his student days, is no reason to discard the facts stated by him. P.W.4 Ricardo Mascarenhas also knew the said Joanita Lobo, wife of Joao Francisco Lobo the testator who was originally from Salcete and who was familiar with his own father. Dr. Ricardo has also stated that he knew the said Joao Francisco Lobo since he was 9 to 10 years old and that even in the year 1976 he had visited the said Joao Francisco Lobo as a Doctor to examine him. In our view, the evidence of P.W.4 Dr. Ricardo Mascarenhas could not be discarded. On the contrary the evidence of Dr. Ricardo had to be accepted as he appears to be a witness of truth and his evidence only fortified the claim of the plaintiffs, as made by the testator himself in the Will, that the testator had no legitimate son and the said Savio was brought or adopted by the testator.

20.The defendants had therefore to discharge a heavy onus that Savio was the legitimate son of the testator.

21.The defendants led evidence of D.W.2 Ilidio Lobo who claimed that the said Savio was the only son of Joao Francisco Lobo and his wife. D.W.2 Ilidio claimed that Savio was born in Belgaum contrary to the claim made by defendant No.1 that Savio was born in Calangute. He stated that he was only 13 years of age at the time when he went to visit the mother of the said Savio in Belgaum in the company of his father, the said Joao Francisco Lobo. The evidence of D.W.2 has got to be discarded in its totality. We are unable to believe that the said Joanita Lobo would have gone to Belgaum for the alleged delivery of the said Savio in the year 1953 or thereabout when the

medical facilities then prevailing in this State were much better than those available in Belgaum and at a time when there was diplomatic hostility between this State as it then existed under the Portuguese regime and the rest of the country and the job of crossing the border was a difficult one. D.W.2 Ilidio's statement that he went by car in the company of the said Joao Francisco Lobo is a palpable falsehood deposed by him at the instance of the defendants possibly with a view to explain the fact that Savio was shown on some of the documents as being born in Belgaum or native of Belgaum. Since it was the case of defendant No.1 that, as told to her the said Savio was born in Calangute, it was not permissible for the defendants to have led contrary evidence in an attempt to prove the birth of Savio in Belgaum.

22. Section 50 of the Evidence Act, 1982, reads as follows :-

“ 50. Opinion on relationship, when relevant. - When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact:

Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, 1869 (4 of 1869), or in prosecutions under section 494, 495, 497 or 498 of the Indian Penal Code (45 of 1860). The illustrations below Section 50 reads as follows :-

(a) The question is, whether A and B were married.

.....

(b) The question is, whether A was the legitimate son of B. The fact that A was always treated as such by members of the family, is relevant. “

23. The defendants claimed that they were residing in the suit house from the time of the marriage of defendant No.1 to the said Savio, a finding regarding which has been given by the learned Civil Judge in favour of the defendants and in our view the said finding, as will be seen little later, cannot be endorsed. The other evidence of conduct relied upon by the defendants is based on conduct as expressed in documents.

24. 'Conduct' as is generally understood is the outward behaviour of a belief entertained. Conduct is an external perceptible fact which can be proved either by the person himself whose opinion is evidence or by some other person acquainted with the facts which express such opinion. What people think can be expressed in words or by conduct. The defendants led no evidence to show that the said Savio was treated by the testator at any time as his legitimate child.

The learned Civil Judge has considered the ration card produced by the defendants as more important document than the electoral roll in coming to the conclusion that the defendants were residing in the said house from the time of marriage of defendant No.1 to the said Savio. In our view, the said finding of the learned Civil Judge cannot be upheld. The plaintiffs themselves had pleaded that the said Savio after having got married to defendant No.1, the defendants lived in the suit house for some time. As

against that, the defendants had pleaded that the defendant No.1 was continuously residing in the suit house being her conjugal domicile, but sometimes the defendant No.1 used to visit her mother and vice versa. P.W.3 Martha Braganza who admittedly resides in the suit house and who has been given certain protection under the said Will, that she should stay there during her lifetime, has stated that from the time she was brought in the suit house by the testator i.e. about 15 years or so (prior to 18.10.03) the defendant No.1 was not residing in the suit house, and, in our view P.W.3 Martha Braganza has got to be believed at least to that limited extent since otherwise no explanation has come forward from the defendants, in case defendant No.1 was the daughter-in-law of the house as to why the testator had to bring the said Martha Braganza as a maid in the said house. The defendant No.1 in her evidence had admitted that the records of her children in the school showed that their addresses were those of her mother's house. She had also admitted that the electoral roll of the year 1995 showed her to be residing in her mother's house. In case the defendants resided in the suit house for some time as pleaded by the plaintiffs then the ration card itself produced by the defendants would not be sufficient to draw an inference that the defendants continued to reside in the suit house until the death of the testator. On the contrary, defendant No.1 has admitted that she was the only child of her parents. In the light of the said admissions obtained by the plaintiffs, it was not possible to conclude that the defendants had continued to stay in the suit house until the death of the testator. In our view in case the defendants were residing in the suit house and more particularly defendant no.1 as the daughter-in-law in the said house, it would not have been possible for the plaintiff No.1 to come and take away

either the cash or the fixed deposits belonging to the deceased testator from the suit house. In case the said cash and fixed deposits were taken by plaintiff No.1 as alleged by the defendants, then defendant no.1 would at least file a complaint against the plaintiff No.1. We are therefore inclined to believe that the defendants came to occupy the suit house again, only after the death of the deceased testator after 1.2.1998, as stated by the plaintiffs.

25. Both the parties have produced the baptism certificate of the said Savio which is otherwise a private document, without examining anyone to prove the contents of the same. Since both the parties have produced the baptism certificate without any objection from one or the other, the said certificate has to speak for itself. The plaintiffs have produced the said baptism certificate in support of their claim to show that Savio was born in Belgaum and was brought from Belgaum by the testator. The defendants have produced the said certificate to show that the said Savio has been shown as the son of Joao Francisco Lobo, and, it has been submitted by Shri Usgaoncar, the learned counsel of the plaintiffs that the said baptism certificate may at the most be evidence to show that Savio was brought to the Catholic fold and baptism could not give legitimacy to the birth of said Savio.

26. On the other hand, Shri Sardessai, the learned counsel on behalf of the defendants, submits that there is a natural presumption that both the parents of Savio were present along with his Godparents at the baptism ceremony and being so the said Joao Francisco Lobo represented before the Church authorities that he was the father of Savio. To show that there is a natural

presumption of the presence of the said parties at the ceremony, Shri Sardessai has relied on the case of **Luis Caetano Viegas v. Estrelina Mariana R.M.A. Da Costa and others [(2002) 9 S.C.C. 144]** .

27. We are unable to accept the submissions of learned Counsel, Shri Sardessai that the said baptism certificate is sufficient evidence to rebut the presumption which the plaintiffs have in their favour by virtue of the statements made by the testator in the said Will and fortified by the evidence of P.W.4 Dr. Ricardo Mascarenhas that the testator had no issue. In the case of Luis Caetano Viegas (supra) it appears that the entire record of baptism certificate was produced and which was read and checked before the Godparents and signed by them along with the pastor. Nothing of that sort has been shown to have happened in this case. On the contrary it does appear that Savio was baptised rather clandestinely in the Church at Verna when in normal course he ought to have been baptised in the Church at Calangute to which the said Joao Francisco Lobo belonged. Savio was not even baptised at the Church of Benaulim to which the said Joanita Lobo belonged and no evidence has been produced by the defendants to say that the said entry of the name of Joao Francisco Lobo was made on the said baptism certificate either at his instance or in his presence. Being so, we are unable to accept the said baptism certificate as a good piece of evidence to rebut the said presumption. If Savio was the legitimate son of Joao Francisco Lobo, then as per practice prevailing in this State his birth would have been registered by the said Joao Francisco Lobo. Even if the said Joao F. Lobo wanted to confer legitimacy to the said Savio, nothing prevented him from registering his birth showing him

as his father. This he chose not to do. Next, the church marriage certificate produced by the defendants of the said Savio with defendant no.1 again shows that the said Savio was born in Belgaum and was residing in Calangute. It again mentions the name of his father as Joao Francisco Lobo and mother Maria Joaninha Milagres de San Francisco Rosario Pereira. Needless to mention that this a private document, the contents of which have not been proved by the defendants. The defendants have also produced the marriage certificate of the said Savio with defendant no.1 wherein again the said Savio has been shown as native of Belgaum and at the same time as being the legitimate son of Joao Francisco Lobo. The information given in the said marriage certificate (Exh.62) could have been given by Savio himself and not by his alleged father, the said Joao Francisco Lobo. In our view, the other documents such as birth certificates of the children of defendant no.1 wherein the grandparents have been referred to as John Francis Lobo or Joanita Lobo would not be sufficient to displace the said presumption because the information given therein cannot be attributed to have been given by the said Joao Francisco Lobo. In our view the defendants failed to prove that Savio was the legitimate son of Joao Francisco Lobo and Joanita Lobo. The evidence produced by the defendants on the probabilities of the case is completely insufficient to rebut the presumption that the testator-Joao Francisco Lobo had no descendant or legitimate son. **Being so**, the defendants were not entitled to succeed to the estate/property of deceased testator Joao Francisco Lobo and his wife Joanita Lobo. The defendants' occupation of the house/property therefore had to be considered to be of trespassers having no right to continue with he said occupation. Plaintiffs' suit therefore ought to have been decreed by the learned

Civil Judge in terms of prayers (a) and (b) of the plaint. As regards prayer © no ground has been taken in the memo of appeal and none has been argued at the time of arguments. Otherwise also, we find that mere statements on the part of P.W.1 Carlos that the plaintiffs ought to be paid mesne profits at the rate of Rs.10,000/- per month or for that matter the mere statement of P.W.4 Dr. Ricardo that the suit house should fetch a rent of Rs.10,000/- per month are quite unconvincing. The plaintiffs could have produced best evidence available by proving as to what were the rents which are being collected by defendant no.1 by virtue of portions of the suit house having been let out to different persons. Nevertheless, in the interests of justice, we leave the matter of awarding mesne profits to the plaintiffs to be decided by the executing court, in case desired by the plaintiffs, at the time of execution in terms of the provisions of O.20 R.10 C.P.C. from the date of the suit only.

28. Before parting with this judgment we would like to observe that although adoption was legally impermissible to the Christians in this State of Goa, many Christian families adopted children whether they had their own or not. At times such children were treated well, almost as their own and at other times, they were treated more as servants of the family. In cases where such family did not have children of their own and in case the parents were treated well by such children, the parents saw that they bequeath the properties to them or saw that they were well settled in life by making sufficient provisions for their future. Nothing of this sort appears to have happened in this case, for after the marriage, the said Savio along with his wife and children (defendants) left the house of the said Joao Francisco Lobo and came to reside at his wife's

house in the same village and the said Joao F. Lobo bequeathed his property before his death to Plaintiff No.1.

29. Lastly, it has been submitted by Shri Sardesai that P.W.4 Dr. Ricardo Mascarenhas has admitted the said Savio was the adopted son and therefore the said Savio was entitled to succeed to the estate of Joao Francisco Lobo in accordance with the law laid down by this Court in the case of **Manuel Theodore D'Souza & Mrs. Lourdes D'Souza (2000(1) All M.R. 39)**. In our view, this submission is totally misplaced. As already stated, adoption was not legally recognized amongst Christians in this State and such 'adopted' children are not entitled to succeed to the estate of their 'adoptive' parents. In any event the judgment of this Court in the case of Theodore D'Souza and another (supra) only recognizes the right to be adopted as an enforceable civil right which is justiciable in a Civil Court and thus guardians who have been appointed by courts in the past and whose guardianship continued could apply for adoption if the period of two years had elapsed since the date of order of appointment of guardianship. It is not the case of the defendants that Joao Francisco Lobo or his wife at any time were appointed as guardians of the said Savio under the Guardians and Wards Act or any other corresponding provision of law in force in this State applicable to them. In any event, we may observe that the said judgment could not have any retrospective effect.

30. In view of the above discussion, First Appeal No. 294/04 is hereby dismissed. First Appeal No. 92/04 is hereby allowed and as a result the Judgment/Decree dated 31.12.2003 of the learned Civil Judge S.D., Mapusa is

hereby set aside and the suit of the plaintiffs is decreed in terms of prayers (a) and (b) of the plaint. As far as prayer © is concerned, we direct an inquiry b e conducted as regards mesne profits in terms of Order 20, Rule 12 of C.P.C. from the date of the suit.

A. P. LAVANDE, J.

N. A. BRITTO, J.

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